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No. 86-33 (3)

In the Supreme Court of the United States

October Term, 1986

CSX CORPORATION (formerly
Chessie Systems, Inc.),
Petitioner,

vs.

OGLEBAY NORTON COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where, as a result of a wharfinger's breach of its implied warranty of workmanlike service, a seaman fell to his death from a dangerous dock while assisting in mooring his vessel, did the Sixth Circuit correctly decide that the shipowner is entitled to be indemnified by the wharfinger, when the shipowner's conduct did not prevent or seriously hamper the wharfinger in the performance of its duties in accordance with its warranty of workmanlike service?

TABLE OF CONTENTS

Question Presented I
Table of Authorities II
Statement of the Case 1
Reasons Why the Writ Should Be Denied 7
1. The Decision Below Does Not Conflict With Decisions of Other Federal Courts of Appeals 8
2. The "Prevent or Seriously Hamper" Standard Utilized by the Court of Appeals Is the Standard Identified by This Court for Use in a Contractual Indemnity Case 12
3. The Issue Does Not Arise With Sufficient Frequency to Warrant Review by This Court 14
Conclusion 15
Appendix (Table of Positions and Authorities, by Circuit, on Standard for Determining "Conduct Sufficient to Preclude Recovery") A1

TABLE OF AUTHORITIES

Cases

Albanese v. N. V. Nederl. Amerik Stoomv. Maats, 346 F.2d 481 (2d Cir. 1965), *rev'd on other grounds*, 382 U.S. 283 (1965) 9, A1
Ammesmaki v. Interlake S.S. Co., 342 F.2d 627 (7th Cir. 1965) 5
Brock v. Coral Drilling, Inc., 477 F.2d 211 (5th Cir. 1973) A2
Burris v. Global Bulk Carriers, Inc., 505 F.2d 1173 (3d Cir. 1974) A2

Crumady v. The J. H. Fisser, 358 U.S. 423 (1959) 5
Dobbins v. Crain Bros., Inc., 567 F.2d 559 (3d Cir. 1977) A2
Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30 (2d Cir. 1980), *cert. denied* 451 U.S. 971 (1981) 11
H & H Ship Service Co. v. Weyerhaeuser Line, 382 F.2d 711 (9th Cir. 1967) A3
Hanseatische Reederei Emil Offen & Co. v. Marine Terminals Corp., 590 F.2d 778 (9th Cir. 1979) A3
Hartnett v. Reiss S.S. Co., 421 F.2d 1011 (2d Cir. 1970), *cert. denied* 400 U.S. 852 (1970) 9
Henry v. A/S Ocean, 512 F.2d 401 (2d Cir. 1975) 9, 10, 11, A1
Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Co., Inc., 444 F.2d 727 (3d Cir. 1971) A2
Hurdich v. Eastmount Shipping Corp., 503 F.2d 397 (2d Cir. 1974) 9, 10, 11
Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964) 5, 13
LeBlanc v. Two-R Drilling Co., 527 F.2d 1316 (5th Cir. 1976) A2
Lopez v. Oldendorf, 545 F.2d 836 (2d Cir. 1976), *cert. denied* 431 U.S. 938 (1977) 10, 11
Master Shipping Agency, Inc. v. M. S. Farida, 571 F.2d 131 (2d Cir. 1978) 11, A1
Mortensen v. A/S Glittre, 348 F.2d 383 (2d Cir. 1965) 9
Oglebay Norton Co. v. CSX Corp., 788 F.2d 361 (6th Cir. 1986) A2
Old Dominion Stevedoring Corp. v. Polskie Linie Oceaniczne, 386 F.2d 193 (4th Cir. 1967) A2
Rederi A/B Nordstjernan v. Crescent Wharf & Warehouse Co., 372 F.2d 674 (9th Cir. 1967) A3

Rios v. Empresas Lineas Maritimas Argentinas, 575 F.2d 986 (1st Cir. 1978) A1

Rodriguez v. Olaf Pedersen's Rederi A/S, 527 F.2d 1282 (2d Cir. 1975), *cert. denied* 425 U.S. 951 (1976) 9, 10, 11, A1

Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956) 5, 7, 12, 13

Simko v. C & C Marine Maintenance Co., 594 F.2d 960 (3d Cir. 1979), *cert. denied* 444 U.S. 833 (1979) 14, A2

Sims v. Chesapeake & Ohio Ry. Co., 520 F.2d 556 (6th Cir. 1975) 5

Smith & Kelly Co. v. S/S Concordia Tadj, 718 F.2d 1022 (11th Cir. 1983) 11

Southern Stevedoring & Contracting Co. v. Hellenic Lines, Ltd., 388 F.2d 267 (5th Cir. 1968) A2

Turner v. Global Seas, Inc., 505 F.2d 751 (6th Cir. 1974) 6, A3

United States v. San Francisco Elevator Co., 512 F.2d 23 (9th Cir. 1975) A3

Waterman S.S. Corp. v. David, 353 F.2d 660 (5th Cir. 1965), *cert. denied* 384 U.S. 972 (1966) 13, A2

Weyerhaeuser S.S. Co. v. Nacirema Operating Co., Inc., 355 U.S. 563 (1958) 5, 6, 7, 8, 13, 14

Miscellaneous

CORBIN, CONTRACTS §§ 295, 315 13

RESTATEMENT OF CONTRACTS §§ 571, 947, 1264 13

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STATEMENT OF THE CASE

Oglebay Norton Company ("Oglebay Norton")[1] brought this admiralty action, as owner of the steamer Sylvania, to recover indemnity or contribution from Chesapeake & Ohio Railway Company ("C&O") for expenses incurred in settling the wrongful death claim of the estate of Ralph Beckman, a seaman aboard the Sylvania who was crushed to death when he fell from C&O's dock while attempting to attach a mooring cable to the dock.

1. Oglebay Norton Company is a publicly traded corporation with no parent company.

The operative facts giving rise to the claim for indemnity are contained in the opinion of the court of appeals below, 788 F.2d 361; Appendix to Petition for Certiorari at 1-14; as supplemented herein with additional detail from the trial record.

On the afternoon of April 4, 1980, the steamer Sylvania, a 572-feet self-unloading bulk carrier owned by Oglebay Norton, departed from Monroe, Michigan, toward the C&O docks in Oregon, Ohio, to load a cargo of coal. The Sylvania had received instructions by radio from C&O to moor at the No. 3 coal dock. While the Sylvania was enroute, a storm passed through the Toledo-Oregon, Ohio region shortly before 5:00 p.m. and caused a power outage at the C&O docks. Attempts by the Sylvania to contact C&O by radio after the storm were unsuccessful.

To reach the C&O docks, it was necessary for the Sylvania to proceed down the narrow Maumee Channel, a 500-feet wide channel outside of which the water was too shallow for the Sylvania to navigate. The Sylvania had been navigating the Maumee Channel for about one and one-half hours when it received instructions from C&O, via the Coast Guard, at about 7:30 p.m., to moor at the No. 2 coal dock rather than the No. 3 coal dock.

Shortly thereafter, Captain Scott on the Sylvania observed that there were no lights at the C&O docks, although the usual lights were present along the shore and at another nearby dock. The Sylvania entered the No. 2 coal dock slip at about 7:40 p.m. with all her lights on. Although it was dusk, it was not yet completely dark. The C&O's electricians had been unable to restore power to the dock, and the dock was not equipped with an emergency lighting system. Consequently, the only lights provided were the lights on the Sylvania.

The No. 2 coal dock has a two-tier concrete design. The upper tier is the main level of the dock. The lower tier, located at the outer edge of the dock, is only about three feet wide, and is approximately three feet below the upper tier. There are no ladders or hand rails between the two tiers. The mooring spiles are on the lower level, requiring a seaman to jump from the upper to the lower tier to moor the vessel. From the lower tier, the concrete dock drops straight down into the water. When a vessel docks, it is flush with the wall since the entire vertical face of the dock is smooth concrete. It is not equipped with fenders, pilings, or similar items to keep the vessel away from the wall, ladders to enable a person to climb out of the water, or recesses to enable a person to swim under the dock. A coal loading machine is located on the dock, and coal regularly would accumulate on the dock.

When the Sylvania docked, there was considerable coal spillage because the C&O employees had not swept the dock of coal, although the dock had about 20 crew members on hand who had not been occupied for almost two hours because of the power failure. Further, the dock and coal remained wet and slippery from the storm. Although the C&O dock superintendent anticipated that the Sylvania would moor under the existing conditions, C&O did not provide illumination for the vessel, despite the opportunity to do so and the availability of flashlights and car lights.

As the Sylvania pulled up to the dock, two seamen, one of whom was Ralph Beckman, were lowered by a landing chair, on the end of a boom, from the vessel to the upper tier of the dock. While Captain Scott did not request the assistance of the C&O dock hands, they observed the

mooring operation but did not volunteer assistance. Beckman was in charge of handling the forward mooring cables, one of which he carried along at the same speed as the slowly moving vessel for approximately 60 feet before he had to step to the lower level. He was not carrying a flashlight, but the vessel's floodlight had been lighting his way. However, as the vessel drew in closer to the dock, the lower level of the dock became darkened by a shadow cast by the curvature of the ship.

Beckman was directed by another deckhand on the vessel, Kevin Hosko, to attach the cable to a particular dock spile on the lower tier. Hosko testified that he and Beckman were able to see the spiles despite the shadow, and he was able to see Beckman's mouth move when Beckman spoke. As Beckman stepped to the lower level in an area littered with coal spillage, he slipped or tripped and fell into the water between the concrete dock face and the vessel. Hosko yelled a warning, but Captain Scott was unable to reverse the ship's motion toward the dock despite the use of the main engine, bow thruster, and the attempted use of safety blocks. Beckman was crushed between the vessel and the dock and was killed instantly.

Beckman's personal representative brought a wrongful death claim against Oglebay Norton under the Jones Act, 46 U.S.C. §688. Oglebay Norton tendered the defense of this claim to C&O, but C&O rejected the tender. The claim was settled for $50,000, and Oglebay Norton incurred $9,857.40 in attorneys' fees in the process. Thereafter, Oglebay Norton instituted this action against C&O to recover indemnity for a breach of the warranty of workmanlike service implicit in C&O's maritime contract to provide

services as a wharfinger,[2] or, in the alternative, to recover contribution.

By consent of the parties, the case was referred to a magistrate for trial, with direct appeal to the court of appeals. The magistrate found that an implied warranty of workmanlike service runs from a wharfinger to a shipowner, and that this warranty had been breached by C&O. The magistrate held, however, that indemnification was precluded because Captain Scott was negligent in failing to provide additional lighting or to anchor until lighting was furnished,[3] and because Scott was aware of the coal dock's dangers and was in a better position to avoid the injury than the wharfinger. The magistrate subsequently amended the judgment, pursuant to Fed. R. Civ. Proc.

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2. Oglebay Norton's claim for implied contractual indemnity is based upon this Court's line of maritime decisions which held that even in the absence of an express agreement of indemnity, a maritime contractor is obligated to indemnify a shipowner for damages caused by a breach of the contractor's implied warranty of workmanlike service. *See Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). *See also Weyerhaeuser S.S. Co. v Nacirema Operating Co., Inc.*, 355 U.S. 563 (1958); *Crumady v. The J. H. Fisser*, 358 U.S. 423 (1959); *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315 (1964). The warranty of workmanlike service also runs from a wharfinger or dockowner, to a shipowner. *E.g., Sims v. Chesapeake & Ohio Ry. Co.*, 520 F.2d 556 (6th Cir. 1975); *Ammesmaki v. Interlake S.S. Co.*, 342 F.2d 627 (7th Cir. 1965).

3. In its brief on appeal, Oglebay Norton pointed out that the finding that the Sylvania could have anchored was clearly erroneous. The Sylvania's 572 feet length exceeded the 500 feet width of the channel. If she had attempted to anchor the Sylvania would have drifted at the end of a long anchor chain according to the forces of wind and current and grounded on the shallow margins of the channel. Furthermore, anchoring in the navigable channel is prohibited by the Coast Guard because the anchored vessel would block the channel to other vessel traffic. Brief of Appellant Oglebay Norton Company at pp. 31-33.

52(b), to award contribution to Oglebay Norton for 25 percent of the loss.[4]

The Sixth Circuit Court of Appeals reversed the magistrate's judgment which denied indemnity to Oglebay Norton. The court of appeals held that a shipowner is entitled to indemnity when a breach of the warranty of workmanlike performance results in loss, "absent conduct on its part sufficient to preclude recovery," citing *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 567 (1958). In the Sixth Circuit, " 'conduct sufficient to preclude recovery' is conduct which 'prevented or seriously hampered [a contractor's] performance of its duty in accordance with its warranty' of workmanlike service." 788 F.2d at 366; Appendix to Petition for Certiorari at 9. The court of appeals held that the magistrate erred by focusing on the relative fault of the parties rather than determining whether Captain Scott's conduct prevented or seriously hampered C&O from performing in a

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4. C&O places heavy emphasis on the magistrate's finding that Oglebay Norton was 75% to blame because Captain Scott "was in charge, and it was he who should have foreseen danger and acted," while C&O was held to be 25 percent at fault because its employees had not "lent a hand." However, C&O's reliance on this allocation is misplaced. As demonstrated in Oglebay Norton's brief on appeal, this allocation of fault was clearly erroneous because it was premised on the erroneous finding that the vessel should have anchored, *see* footnote 3, *supra*, and the allocation failed to take into account C&O's responsibility for the multiple hazards on the dock. Brief of Appellant Oglebay Norton Company at pp. 30-37. The court of appeals disapproved that allocation of fault in footnote 13 of its opinion:

> However, the magistrate's calculation of fault cannot be removed from his [erroneous] understanding of *Turner* [*v. Global Seas, Inc.*, 505 F.2d 751 (6th Cir. 1974)]. He calculated C&O's fault by its failure to offer aid to Captain Scott rather than the dangerous nature of the dock. Further, as previously noted, comparative fault has no meaning in an indemnity action.

788 F.2d at 367, n.13; Appendix to Petition for Certiorari at 12, n.13.

workmanlike manner, which converted the contract action into a tort action, contrary to this Court's decisions in *Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), and *Weyerhaeuser*. There was no evidence that Captain Scott's conduct prevented C&O from sweeping the coal, providing emergency lighting or adding safety features to make the dock less dangerous,[5] and the court concluded that Oglebay Norton was entitled to indemnity.

REASONS WHY THE WRIT SHOULD BE DENIED

Several factors strongly suggest that this Court should deny the petition for a writ of certiorari. First, there is no conflict between the decision below and the rule prevailing in the other circuits as to the proper standard for determining "conduct sufficient to preclude recovery." Indeed, it is the unanimous view of the circuits that the proper standard for resolving this issue is whether the shipowner's conduct prevents or seriously hampers or handicaps the contractor in the workmanlike performance of its duty.

Second, the standard adopted by the various courts of appeals, including the court below, is the very standard identified by this Court for resolution of this issue in a maritime contract case.

Finally, the issue does not arise with sufficient frequency to warrant this Court's review. The case below,

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5. Three other seamen had been crushed in a similar fashion at C&O's docks on previous occasions, and the C&O docks are the only known docks on the Great Lakes that fail to provide any safety features to prevent a man in the water from being crushed.

decided April 14, 1986, is the first reported appellate decision to consider the issue of "conduct sufficient to preclude recovery" since 1979.

The foregoing factors, discussed in more detail below, amply demonstrate that issuance of a writ of certiorari is not appropriate in this case.

1. The Decision Below Does Not Conflict With Decisions of Other Federal Courts of Appeals.

With respect to a shipowner's right to indemnity based upon its contractual relationship with a stevedore, this Court has held:

> If in that regard [the stevedore] rendered a substandard performance which led to foreseeable liability of [the shipowner], the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*

Weyerhaeuser S.S. Co. v. Nacirema Operating Co., Inc., 355 U.S. 563, 567 (1958) (emphasis added).

The Sixth Circuit Court of Appeals in the decision below held that "conduct sufficient to preclude recovery" requires conduct by the shipowner which "prevented or seriously hampered" the contractor's performance of its duty in accordance with its warranty of workmanlike service. 788 F.2d at 366; Appendix to Petition for Certiorari at 9. The Sixth Circuit standard is substantially identical to the standards adopted in the six other circuits to consider the issue of what conduct by the shipowner is sufficient to preclude recovery.[6]

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6. The positions of the various circuits on the standard for determining "conduct sufficient to preclude recovery," together with citations, are outlined in the Appendix to this brief.

C&O represents in its petition that there is a "patent" and "sharp" conflict among the circuits as to the standard by which the courts determine shipowner conduct sufficient to preclude recovery. However, C&O supports this characterization with citations to only three decisions of the Second Circuit Court of Appeals and a smattering of district court decisions, primarily within the Second Circuit. A close examination of these and other decisions of the Second Circuit Court of Appeals reveals that the rule prevailing within the Second Circuit is in fact the "prevent or seriously handicap" standard applied in the decision below, and adopted in every other circuit to consider the issue.

In a line of cases prior to 1974, the Second Circuit firmly established the rule that in order to preclude recovery, the shipowner's fault "must at least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough." *E.g., Albanese v. N. V. Nederl. Amerik Stoomv. Maats,* 346 F.2d 481 (2d Cir.), *rev'd on other grounds,* 382 U.S. 283 (1965); *Mortensen v. A/S Glittre,* 348 F.2d 383 (2d Cir. 1965); *Hartnett v. Reiss S.S. Co.,* 421 F.2d 1011 (2d Cir.), *cert. denied* 400 U.S. 852 (1970).

In 1974 the Second Circuit decided *Hurdich v. Eastmount Shipping Corp.,* 503 F.2d 397 (2d Cir. 1974), cited by petitioner for the supposed adoption of a standard other than the prevailing "prevent or seriously handicap" standard. However, in the subsequent cases of *Henry v. A/S Ocean,* 512 F.2d 401 (2d Cir. 1975), and *Rodriguez v. Olaf Pedersen's Rederi A/S,* 527 F.2d 1282 (2d Cir. 1975), *cert. denied* 425 U.S. 951 (1976), the Second Circuit clearly applied the "prevent or seriously handicap" standard in affirming judgments awarding indemnity to shipowners.

In *Rodriguez*, the Second Circuit explained its holding in the *Hurdich* case. The appellant in *Rodriguez* contended, as C&O does here, that in *Hurdich* the court had adopted a new definition of conduct sufficient to preclude recovery. However, after reviewing prior cases, the court rejected that contention and distinguished *Hurdich* on its facts, because the injury there occurred to a seaman aboard ship in an area over which the shipowner had exclusive control, and the ship alone was capable of correcting the dangerous condition. 527 F.2d at 1285-1286. The court in *Rodriguez* observed that *Hurdich* had not been decided on the basis that the shipowner's fault was merely concurrent; rather, it was an intervening cause. The court concluded that *Hurdich* "does not explicitly disavow the earlier line of cases already discussed," and "we believe that we must still apply the 'prevent or hinder' standard." 527 F.2d at 1286. Thus, *Hurdich* does not stand for the proposition proposed by C&O.

The second case cited by C&O as purportedly creating a conflict among the circuits is *Lopez v. Oldendorf*, 545 F.2d 836 (2d Cir. 1976), *cert. denied* 431 U.S. 938 (1977). However, *Lopez* was decided by the district court as a contribution case, rather than a true indemnity case. 545 F.2d at 839. In reversing the award of contribution in favor of the shipowner, the court went on to suggest, in *obiter dictum*, that the shipowner was precluded from recovery of indemnity, citing the discredited *Hurdich* case and omitting any reference to the proper standard that had been reaffirmed recently in the *Henry* and *Rodriguez* cases. This *obiter dictum* is not sufficient to create a conflict among the circuits.

In a decision subsequent to *Lopez*, the court of appeals affirmed a judgment awarding indemnity to a shipowner

and once again confirmed that the proper standard to be applied in the Second Circuit is the "prevent or seriously handicap" standard. *Master Shipping Agency, Inc. v. M. S. Farida,* 571 F.2d 131, 133 (2d Cir. 1978). *Master Shipping* further eroded the precedential value of *Hurdich* upon which C&O relies.

The final decision proffered by C&O as evidence of a conflict among the circuits is *Doca v. Marina Mercante Nicaraguense, S.A.,* 634 F.2d 30 (2d Cir. 1980), *cert. denied* 451 U.S. 971 (1981). However, the indemnity dispute in *Doca* was decided on the ground that the stevedore had not breached its warranty of workmanlike service. 634 F.2d at 34. Thus, it was not necessary for the court to consider whether the shipowner's conduct was sufficient to preclude recovery. The court's reference, in *obiter dictum* to the previous *obiter dictum* in *Lopez* and to the discredited *Hurdich* case, with respect to conduct sufficient to preclude indemnity, does not rise to the level of establishing a conflict among the circuits.

The foregoing review of Second Circuit cases demonstrates that the last three decisions of that court to actually consider and apply the standard for determining "conduct sufficient to preclude recovery" as a basis for the decision have each applied the "prevent or seriously handicap" standard that prevails unanimously in the other circuits. *See Master Shipping Agency, Inc. v. M. S. Farida, supra; Rodriguez v. Olaf Pedersen's Rederi A/S, supra;* and *Henry v. A/S Ocean, supra.*

Finally, C&O provides a *confer* citation to *Smith & Kelly Co. v. S/S Concordia Tadj,* 718 F.2d 1022 (11th Cir. 1983), in its quest to manufacture a conflict among the circuits where none exists. This case declined to extend

Ryan indemnity in circumstances where a seaman was injured at sea as a result of shipboard conditions which accumulated over a period of approximately six months. Obviously, since the court was not applying *Ryan* indemnity, the decision has nothing to do with the standard for consideration of one of the elements of *Ryan* indemnity, and this decision provides no support to C&O's position.

The so-called "patent" and "sharp" conflict perceived by C&O between the decisions of the Second Circuit on the one hand, and the unanimous view expressed in the decision of the Sixth Circuit below on the other, is nothing more than an illusion, a phantom which vanishes upon close scrutiny. There simply is no conflict among the decisions of the circuits on the standard for determining shipowner conduct sufficient to preclude recovery. There is no basis for granting the petition for certiorari under Rule 17 of this Court's Rules, and the petition should be denied.

2. The "Prevent or Seriously Hamper" Standard Utilized by the Court of Appeals Is the Standard Identified by This Court for Use in a Contractual Indemnity Case.

This Court's decisions have made it quite clear that the shipowner's claim for breach of a contractor's implied warranty of workmanlike service sounds in contract, not tort. The *Ryan* decision is replete with references to the contractual nature of the action. *See* 350 U.S. at 130-134. Quotation of one such reference is adequate to illustrate the point:

> The shipowner's action is not changed from one for a breach of contract to one for a tort simply because recovery may turn upon the standard of the performance of petitioner's stevedoring service.

Ryan Stevedoring Co., Inc. v. Pan-Atlantic S.S. Corp., supra, 350 U.S. at 134. *See also Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.,* 376 U.S. 315, 324 (1964) ("we deal here with a suit for indemnification based upon a maritime contract").

The Court in *Weyehaeuser,* mindful of the contractual nature of the indemnity action, provided ample direction to the lower courts to apply contractual principles in determining "conduct sufficient to preclude recovery." In footnote 6 of the *Weyerhaeuser* decision, 355 U.S. at 567, the Court cited CORBIN, CONTRACTS §§ 571, 947, 1264 and RESTATEMENT OF CONTRACTS §§ 295, 315, each of which refers to actions of one party to a contract which *prevent or hinder* the performance of the other party. *See Waterman S.S. Corp. v. David,* 353 F.2d 660, 665 (5th Cir. 1965), *cert. denied* 384 U.S. 972 (1966). Moreover, in *Weyerhaeuser* the Court specifically cautioned against the use of tort principles in resolution of the contractual indemnity action. "[W]e believe sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate." *Weyerhaeuser S.S. Co. v. Nacirema Operating Co., Inc., supra,* 355 U.S. at 569, citing *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*

The "prevent or seriously hamper" standard utilized by the court of appeals below is precisely the contractual standard designated by this Court in *Weyerhaeuser* for determining conduct sufficient to preclude recovery. There is no justification in this case for granting a writ of certiorari to engage in mere routine appellate review of the court of appeals' application of the correct standard to the facts of this case, which is what C&O's petition asks this Court to do.

3. The Issue Does Not Arise With Sufficient Frequency to Warrant Review by This Court.

The case below, decided on April 14, 1986, is the first reported decision by a court of appeals to address the proper standard for determining shipowner "conduct sufficient to preclude recovery" since the February 20, 1979 decision of the Third Circuit in *Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960 (3d Cir. 1979), *cert. denied* 444 U.S. 833 (1979).

Where an issue has arisen only once in the last eight years, that issue is not of such public importance as to warrant this Court's expenditure of its limited time and resources to review the matter. The case below is primarily of importance to the individual parties now before the Court.

The infrequency with which the issue of "conduct sufficient to preclude recovery" arises, particularly when coupled with the factor that the circuits are unanimous in their adoption of the contractual "prevent or seriously handicap" standard—the very standard suggested by this Court in footnote 6 in *Weyerhaeuser*—strongly suggests that a writ of certiorari is inappropriate in this case. The petition should be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF POSITIONS AND AUTHORITIES, BY CIRCUIT, ON STANDARD FOR DETERMINING "CONDUCT SUFFICIENT TO PRECLUDE RECOVERY"

The positions of the various circuits on the standard for determining "conduct sufficient to preclude recovery," together with supporting authorities, are as follows:

First Circuit

Rios v. Empresas Lineas Maritimas Argentinas, 575 F.2d 986, 989, 990 (1st Cir. 1978) (right to indemnification can be lost if shipowner "impeded or hindered" stevedore from performing in a workmanlike manner).

Second Circuit

E.g., Master Shipping Agency, Inc. v. M.S. Farida, 571 F.2d 131, 133 (2d Cir. 1978) (shipowner's conduct will preclude it from obtaining indemnity only where it "prevented or seriously handicapped the stevedore in his effort to perform his duties"); *Rodriguez v. Olaf Pedersen's Rederi A/S*, 527 F.2d 1282 (2d Cir. 1975), *cert. denied* 425 U.S. 951 (1976); *Henry v. A/S Ocean*, 512 F.2d 401 (2d Cir. 1975); *Albanese v. N. V. Nederl. Amerik Stoomv. Maats*, 346 F.2d 481 (2d Cir. 1965), *rev'd on other grounds*, 382 U.S. 283 (1965). Second Circuit cases are discussed in greater detail in the text of the brief in opposition at pp. 9-11.

Third Circuit

E.g., Simko v. C & C Marine Maintenance Co., 594 F.2d 960, 968 (3d Cir. 1979), *cert. denied* 444 U.S. 833 (1979) (indemnity is not barred where owner's conduct did not "prevent or hinder" the contractor from completing a workmanlike performance); *Dobbins v. Crain Bros., Inc.*, 567 F.2d 559 (3d Cir. 1977); *Burris v. Global Bulk Carriers, Inc.*, 505 F.2d 1173 (3d Cir. 1974); *Humble Oil & Refining Co. v. Philadelphia Ship Maintenance Co., Inc.*, 444 F.2d 727 (3d Cir. 1971).

Fourth Circuit

Old Dominion Stevedoring Corp. v. Polskie Linie Oceaniczne, 386 F.2d 193, 197 (4th Cir. 1967) (shipowner's conduct "must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job" to preclude recovery).

Fifth Circuit

E.g., LeBlanc v. Two-R Drilling Co., 527 F.2d 1316, 1321 (5th Cir. 1976) (the question is "whether conduct or circumstances of the condition for which Shipowner has a legal responsibility seriously impeded or prevented Contractor from performing the job in a safe and workmanlike manner"); *Brock v. Coral Drilling, Inc.*, 477 F.2d 211 (5th Cir. 1973); *Southern Stevedoring & Contracting Co. v. Hellenic Lines, Ltd.*, 388 F.2d 267 (5th Cir. 1968); *Waterman S.S. Corp. v. David*, 353 F.2d 660 (5th Cir. 1965), *cert. denied* 384 U.S. 972 (1966).

Sixth Circuit

Oglebay Norton Co. v. CSX Corp., 788 F.2d 361 (6th Cir. 1986) (conduct sufficient to preclude recovery is

" 'conduct which prevented or seriously hampered [a contractor's] performance of its duty in accordance with its warranty' of workmanlike service"); *Turner v. Global Seas, Inc.*, 505 F.2d 751 (6th Cir. 1974).

Ninth Circuit

E.g., Hanseatische Reederei Emil Offen & Co. v. Marine Terminals Corp., 590 F.2d 778, 783 (9th Cir. 1979) (if the shipowner's conduct does not " 'prevent or seriously handicap the stevedore' in doing a workmanlike job," the shipowner is not precluded from indemnification); *United States v. San Francisco Elevator Co.*, 512 F.2d 23 (9th Cir. 1975); *H & H Ship Service Co. v. Weyerhaeuser Line*, 382 F.2d 711 (9th Cir. 1967); *Rederi A/B Nordstjernan v. Crescent Wharf & Warehouse Co.*, 372 F.2d 674 (9th Cir. 1967).